Supreme Court of the United States

No. 707. October Term, 1941.

LEWIS J. VALENTINE, individually and as Police Commissioner of the City of New York,

Petitioner,

against

F. J. CHRESTENSEN.

PETITIONER'S MEMORANDUM SUPPORTING THE PROPOSITION THAT THIS CAUSE IS NOT MOOT.

April 2, 1942.

WILLIAM C. CHANLER,
Corporation Counsel,
Counsel for Petitioner.

LEO BROWN,
of Counsel.

Table of Cases Cited.

Statute Cited

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During the course of the argument of this cause before this Court on March 31, 1942, in answer to questions from the Court, it developed that respondent and his submarine were not now in the City of New York, but were at present in the City of Albany, New York. The question arose as to whether this fact rendered the present controversy moot. We submit that the controversy is not moot, and requires determination by this Court upon the merits.*

(a)

The final decree of injunction in this case provides in part as follows (R., pp. 9-10):

> "Ordered, adjudged and decreed that Section 318 of the Sanitary Code * * * insofar as it prohibits the distribution of handbills containing commercial

* Mr. Walter W. Land, counsel for the respondent, authorizes us to state that he joins in this memorandum.

> or business advertising matter upon such streets, sidewalks and public places of New York City * * * is unconstitutional and invalid as applied to the distribution *by plaintiff or his agents* upon said streets, sidewalks and public places of handbills, *such as Plaintiff's Exhibit A in this cause*, and the defendant and members of the Police Department *are hereby perpetually enjoined from interfering with said distribution of handbills such as Plaintiff's Exhibit A, by the plaintiff or his agents upon said streets*, * * *." (Italics ours.)

It is apparent from a mere reading of this final decree that its scope and effectiveness are wholly unrelated to the whereabouts of respondent's submarine. Respondent himself, or through his agents, is given the perpetual right to distribute handbills "such as Plaintiff's Exhibit A" anywhere on the streets of the City of New York at any time, notwithstanding the provisions of § 318 of the Sanitary Code of the City of New York, and petitioner is perpetually restrained from interfering with such distribution.

The submarine is now in Albany. Respondent's counsel stated on the argument that respondent would in all probability seek to exhibit it in New York City again, and to distribute handbills in connection therewith. Certainly, under this decree he has a continuing right to do so, and certainly, if our position in this case is correct, that is a continuing right protected by this decree to violate § 318 of the Sanitary Code,

But quite apart from the whereabouts of respondent's submarine, respondent could distribute handbills on the streets of New York City right now under this decree, informing persons in New York that the submarine may be seen in Albany at present, or announcing the date of its future return to New York.

Nor is the decree limited even to a handbill advertising respondent's submarine. He has an absolute and continuing right under this decree to distribute any handbill "such as" handbill A, either by himself or through his agents. Thus, Chrestensen now has the power, if he should so desire, to set himself up in the advertising business and, through his agents, flood the streets of New York with handbills modeled in form upon handbill A, advertising any other product which he may obtain as a client, in total disregard of § 318 of the Sanitary Code.

It is thus apparent that the final decree by its terms is still continuing and effective, and, unless reversed, will so continue as long as respondent is alive. We have never before heard it suggested that a perpetual injunction lost its effectiveness merely because, for the moment, the party benefited by the injunction happened not to be taking full advantage of his rights.

It is therefore unnecessary to consider the bearing upon this question of the obvious fact that until reversed, the existing decision of the Circuit Court of Appeals would effectively prevent public officials from interfering with the street distribution of such handbills as handbill A, probably throughout the nation, and certainly, throughout the territory embraced by the Second Circuit. *Cf., Boise City Irr. & Land Co.* v. *Clark*, 131 Fed. 415, 418-419 (C. C. A., 9th, 1904), cited with approval in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 515, 516 (1911).

Since it is clear that the constitutional validity of § 318 of the Sanitary Code must still be determined here, it seems to us that it requires but little citation of authority to demonstrate that the controversy has not become moot. We respectfully refer the Court to the following cases: *Federal Trade Commission* v. *Goodyear Tire and Rubber Co.*, 304

U. S. 257, 260 (1938); *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 307-310 (1897); *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 514-516 (1911); *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433, 452 (1911); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 413-414 (1934); *Leonard & Leonard* v. *Earle*, 279 U. S. 392, 398 (1929); *McGrain* v. *Daugherty*, 273 U. S. 135, 181-182 (1927).

(b)

The situation in this case is not one where respondent expected to exhibit his submarine in New York City for a fixed and definite period of time, and desired to have his right to distribute his handbills on the City streets determined only for that period. What he sought and obtained here was an adjudication that the regulation involved was unconstitutional and invalid, and that he could whenever he desired distribute handbills such as handbill A upon the City streets free from restraint. Thus, it becomes obvious that this controversy is vastly different from one in which it is sought to secure the right to vote at an election when the date of the election has already passed by, *Mills* v. *Green*, 159 U. S. 651 (1895); *Jones* v. *Montague*, 194 U. S. 147 (1904); or in which title to public office is involved and the term of office fixed by law has expired, *Tennessee* v. *Condon*, 189 U. S. 64 (1903); *Alejandrio* v. *Quezon*, 271 U. S. 528 (1926). Neither is it at all similar to a suit in which a permit sought to be canceled has expired by its terms, *Security Life Ins. Co.* v. *Prewitt*, 200 U. S. 446 (1905); or in which an agreement has been rendered ineffective by reason of war, *United States* v. *Hamburg-American Co.*, 239 U. S. 466 (1916); or in which the statute governing the cause has been repealed, amended or rendered ineffective, *Berry* v. *Davis*,

242 U. S. 469 (1917); *Board of Public Utility Commissioners* v. *Compania General*, 249 U. S. 425 (1919); *Atherton Mills* v. *Johnston*, 259 U. S. 13 (1922); or in which the property that constituted the subject matter of the suit has been conveyed away, *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360 (1919); *Heitmiller* v. *Stokes*, 256 U. S. 359 (1921); or in which the act sought to be compelled has been performed, *Brownlow* v. *Schwartz*, 261 U. S. 216 (1923).

It follows that the controversy is not moot, and should be finally determined by this Court.

New York, N. Y., April 2, 1942.

Respectfully submitted,

WILLIAM C. CHANLER,
Corporation Counsel,
Counsel for Petitioner.

LEO BROWN,
of Counsel.

LAWYERS PRESS, INC., 165 William St., N. Y. C.; 'Phone: BEekman 3-2300